No. 98-238

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

TOGO D. WEST, JR., SECRETARY, DEPARTMENT OF VETERANS AFFAIRS,

Petitioner,

v.

MICHAEL GIBSON,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT

TIMOTHY M. KELLY
Counsel of Record
BEERMANN, SWERDLOVE, WOLOSHIN, BAREZKY, BECKER, GENIN & LONDON
161 North Clark Street, Suite 2600
Chicago, Illinois 60601
(312) 621-9700

Attorneys for Respondent

Midwest Law Printing Co., Chicago 60610, (312) 321-0220

QUESTION PRESENTED

Whether a federal employee's complaint for compensatory damages pursuant to Section 102 of the Civil Rights Act of 1991 should be dismissed for failure to exhaust administrative remedies because he did not use magic words at an earlier stage.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes and Regulations

Miscellaneous

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 137 F.3d 992. The opinion of the district court (Pet. App. 15a-28a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 3, 1998. A petition for rehearing was denied on May 7, 1998. (Pet. App. 29a.) A petition for a writ of certiorari was filed on August 5, 1998, and was granted on January 15, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of Title 42 of the United States Code are set forth in the appendix to the petition.

STATEMENT OF THE CASE

Respondent Michael Gibson has been a federal employee since 1977, first in the Armed Forces and then for the petitioner Department of Veterans Affairs. (R.22, Plaintiff's Response to Defendant's Rule 12(M) Statement, Exhibit A, p.1 (hereinafter "Gibson Affidavit").) In 1988, Gibson became an accountant for the VA in Albuquerque, and in 1989, he transferred to a facility in Phoenix. (R.22, Gibson Affidavit, p.1.) In July of 1990, Gibson transferred to the VA Supply Depot in Hines, Illinois, as a GS 9 accountant. (R.22, Gibson Affidavit, p.1.)

In 1992, Gibson applied for a GS 11/12 Supervisory Accountant position which was advertised nationally through the VA. (R.22, Gibson Affidavit, p.1.) The two federal employees who were making the decision concerning the promotion, the chief and the assistant chief of the fiscal division, both female, passed over Gibson to promote a far less experienced female to the GS 11/12 position. (R.22, Gibson Affidavit, pp.1-2.) Gibson filed a timely EEO complaint in December of 1992. (Jt. App. 23-24.)

Gibson discussed his complaint with an EEO counselor for the VA, but the counselor never advised Gibson that he could receive damages for mental and emotional distress based on the VA's intentional discrimination. (R.22, Gibson Affidavit, p.2.) Gibson filled out the EEO complaint form, identifying himself as the complainant, the facility involved, and the actions or practices forming the basis for his complaint. (Jt. App. 23.) The complaint form had a box asking what "corrective action" the complainant was seeking, and Gibson wrote "GS 11 backpay, transfer to VA Hines Hospital, or other hospital of my choice." (Jt. App. 23.)

In the course of administrative proceedings, an EEO investigator asked Gibson what he wanted to settle the case, and Gibson responded, in part, "Monetary cash award. . . ." (R.25, Defendant's Reply to Plaintiff's Rule 12(N) Statement, Exhibit 2, p. 13.) The VA found no discrimination, and Gibson took a timely appeal to the EEOC. (Jt. App. 30-32.) While Gibson's EEO complaint was pending in the VA and the EEOC, the Supply Depot at Hines closed. (R.22, Gibson Affidavit, p.4.) Federal employees at the Supply Depot, including Gibson, were entitled to reassignment at other facilities on

favorable terms. (R.22, Gibson Affidavit, p.4.) Gibson applied for reassignment back in Albuquerque, but was rejected, at least in part due to the perception that he had stagnated at GS 9. (R.22, Gibson Affidavit, pp.4-5.)

For three years, Gibson worked under the employee who had been promoted past him, and he continued to report to the two supervisors who had discriminated against him. (R.22, Gibson Affidavit, p.5.) Gibson's stomach was tied in knots, and he laid awake nights worrying about his employment situation. (R.22, Gibson Affidavit, p.5.) On October 6, 1995, the EEOC issued its final decision finding that Gibson's supervisors had discriminated against him based on sex. (Jt. App. 30-51.) The EEOC ordered the VA to promote Gibson within 30 days, calculate backpay and interest within 60 days, and pay Gibson within 60 days thereafter. (Jt. App. 43-44.)

After the EEOC decision, Gibson hired an attorney to negotiate a settlement with the VA. (R.22, Gibson Affidavit, p.6.) As of January 11, 1996, the 90th day after his receipt of the EEOC decision, Gibson had received no calculation of backpay or interest, and had received no response to his settlement offers. (R.22, Gibson Affidavit, p.6.) On January 11, 1996, Gibson filed his complaint in federal district court seeking enforcement of the EEOC decision and additional relief not awarded by the EEOC. (Jt. App. 25-29.) Gibson alleged that he had suffered humiliation, mental anguish and emotional distress as a result of the VA's intentional discrimination, and he requested a jury trial as to compensatory damages. (Jt. App. 28-29.)

The VA filed a motion to dismiss or in the alternative for summary judgment, arguing that Gibson had failed

to exhaust his administrative remedies with respect to his request for compensatory damages, and that the VA had complied with the EEOC decision, mooting Gibson's enforcement claims. (R.14, Memorandum, pp. 1-8.) Gibson responded, agreeing that the VA had complied with the EEOC decision, but arguing that the VA's failure to comply timely forced Gibson to file suit. (R.21, Response Memorandum, pp. 18-20.)

With respect to the exhaustion doctrine, Gibson argued that he had followed all the procedures applicable to an employment discrimination claim, but had not been compensated for his pain and humiliation. (R.21, Response Memorandum, pp. 6-12.) Gibson argued further that the VA and the EEOC had made no provision for awards of general compensatory damages at the administrative level, and that the EEO counselor who advised Gibson had failed to mention his right to seek such damages. (R.21, Response Memorandum, pp. 12-16.)

On October 2, 1996, the district court issued its memorandum opinion and order, granting in part and denying in part the VA's motion. (Pet. App. 15a-28a.) The court found that Gibson failed to exhaust his administrative remedies with respect to his request for compensatory damages, and that the VA had complied with the EEOC decision, but only after Gibson was required to file suit. (Pet. App. 20a-27a.) The court entered judgment in favor of the VA against Gibson as to all claims except Gibson's request for attorney's fees, and found no just reason for delay. (R.29, Judgment.) Gibson filed a timely notice of appeal. (R.31, Notice of Appeal.)

The court of appeals reversed, reasoning that administrative awards of compensatory damages were inconsistent with the plain language of the Civil Right Act of 1991, 42 U.S.C. § 1981a. (Pet. App. 8a-9a.) The court of appeals rejected the notion that EEOC could award compensatory damages in the first instance subject to *de novo* review: "Not only would that be expensively duplicative, but . . . the statutory scheme promulgated by Congress does not allow the EEOC to issue what would be nonappealable awards of compensatory damages." (Pet. App. 9a.) In so ruling, the Seventh Circuit declined to follow *Fitzgerald v. Secretary, Veterans Affairs,* 121 F.3d 203 (5th Cir. 1997). (Pet. App. 10a.)

The Seventh Circuit gave three reasons for its conclusion. First, under the EEOC's approach, the right to a jury trial was lost, and the jury trial provision of the statute was nullified. (Pet. App. 10a.) The *Fitzgerald* court never addressed the jury trial issue, because the parties never raised it. (Pet. App. 10a.) Second, the statute conferred the right to a jury trial in "an action" as opposed to "a proceeding" which, in the context of Title VII, clearly referred to civil actions in federal district court, not EEOC proceedings. (Pet. App. 10a-11a.) Third, Congress had, by "clear expression," limited its waiver of sovereign immunity to actions in court where the parties had the right to trial by jury. (Pet. App. 12a-13a.).

The Seventh Circuit stated:

> In concluding that EEOC may not order the government to pay compensatory damages, we recognize the EEOC's responsibility to issue any orders it deems "necessary and appropriate." We are not displacing any right that the EEOC his-

> torically has enjoyed. We simply conclude that Congress has determined it is inappropriate for the EEOC to order the government to pay compensatory damages, a right which it never had in the first place.

(Pet. App. 13a.)

SUMMARY OF THE ARGUMENT

With respect to awards of compensatory damages in federal employment discrimination cases, Congress limited its waiver of sovereign immunity to actions in federal district court in which any party may demand a trial by jury. A waiver of sovereign immunity cannot be implied but must be unequivocally expressed, and limitations and conditions upon a waiver of sovereign immunity must be strictly observed. *Lane v. Pena*, 518 U.S. 187, 192 (1996); *Lehman v. Nakshian*, 453 U.S. 156, 161 (1981). Congress has not unequivocally expressed a waiver of sovereign immunity from compensatory damages at the administrative level, and the award of such damages by the EEOC would violate the explicit conditions which Congress has placed on its waiver.

Section 717 of the Civil Rights Act of 1964 waived sovereign immunity only as to equitable remedies. Section 102 of the Civil Rights Act of 1991 waived sovereign immunity only as to awards of compensatory damages in federal district court where any party may demand a jury trial. The EEOC may not extend these waivers by implication to administrative awards of compensatory damages, and the EEOC may not interpret out of existence a jury trial right which Congress clearly expressed.

Assuming *arguendo* that the EEOC did have authority to award compensatory damages, respondent submits that the judgment of the court of appeals should be affirmed on alternate grounds. Undisputed facts demonstrate that Mike Gibson exhausted his administrative remedies, and undisputed facts further demonstrate that petitioner should be estopped from asserting the bar of exhaustion. The Court should affirm the judgment of the court of appeals.

ARGUMENT

I.

CONGRESS HAS NOT WAIVED SOVEREIGN IMMUNITY FROM AWARDS OF COMPENSATORY DAMAGES IN ADMINISTRATIVE PROCEEDINGS UNDER TITLE VII

It is now well settled that a waiver of sovereign immunity must be unequivocally expressed in statutory text, and will not be implied. *Lane v. Pena*, 518 U.S. 187, 192 (1996); *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33-34 (1992). Legislative history cannot supply the required unequivocal expression, *Lane v. Pena*, 518 U.S. at 192, nor can a waiver of sovereign immunity be found in the general purposes of a statute, *United States v. Testan*, 424 U.S. 392, 399-400 (1976), or in the policy concerns underlying the statute. *Library of Congress v. Shaw*, 478 U.S. 310, 320-21 (1986). Executive officials cannot waive the Government's sovereign immunity. *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 513-14 (1940).

Moreover, waivers of sovereign immunity must be "construed strictly in favor of the sovereign," *McMahon*

c. *United States*, 342 U.S. 25, 27 (1951), and not enlarged beyond what the language of the statute requires, *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685 (1983). See *United States v. Nordic Village, Inc.*, 503 U.S. 30, 34 (1992). Specifically, the "limitations and conditions upon which the Government consents to be sued must be strictly construed and exceptions thereto are not to be implied," *Lehman v. Nakshian*, 453 U.S. 156, 161 (1981) quoting *Soriano v. United States*, 352 U.S. 270, 276 (1957), and when confronted with a purported waiver of sovereign immunity, the Court will construe ambiguities in favor of immunity, *United States v. Williams*, 514 U.S. 527, 531 (1995).

Neither Section 717 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16, nor Section 102 of the Civil Rights Act of 1991, 42 U.S.C. § 1981a, contains an express waiver of sovereign immunity from compensatory damages in administrative proceedings. To the contrary, the waiver of sovereign immunity in Section 717 is limited to equitable relief, and the waiver of sovereign immunity in Section 102 is limited to actions in which any party may demand a trial by jury. Aside from impermissible reliance on legislative history and agency interpretation, petitioner's argument must be rejected because it turns the law of sovereign immunity on its head: Petitioner's argument relies on a broad construction of the waivers at issue, it reads limitations on the waivers out of existence, and it construes ambiguities against immunity.

Ultimately, the Government's position fails the unequivocal expression test and endorses an implied waiver of sovereign immunity.

A. Section 717 of the Civil Rights Act of 1964 does not provide the unequivocal statement required to accomplish a waiver of sovereign immunity from administrative awards of compensatory damages

Section 717 was added to Title VII of the Civil Rights Act of 1964 by Section 11 of the Equal Employment Opportunity Act of 1972. Pub.L. No. 92-261 § 11, Mar. 24, 1972, 86 Stat. 111, 42 U.S.C. § 2000e-16 (hereinafter "Section 717"). Briefly, Section 717(a) proscribes discrimination in federal employment; Sections 717(b) and (c) "establish complementary administrative and judicial enforcement mechanisms designed to eradicate federal employment discrimination;" Section 717(d) incorporates Section 706(f) through (k) of the Act, which "govern such issues as venue, the appointment of attorneys, attorneys' fees, and the scope of relief;" and Section 717(e) preserves the "primary responsibility" of each agency for nondiscrimination in employment. *Brown v. General Services Administration*, 425 U.S. 820, 831-32 (1976); 42 U.S.C. § 2000e-16; 42 U.S.C. § 2000e-5(f)-(k).

In Section 717, Congress expressly waived sovereign immunity only as to equitable remedies. Congress did not, as petitioner suggests, delegate a standardless authority to enforce Title VII through appropriate remedies (Petitioner's Brief, p. 13); rather, Congress delegated the "authority to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section. . . ." 42 U.S.C. § 2000e-16(b) (emphasis added). This delegation consciously echoed and nar-

rowed the judicial remedies provision of Section 706(g), stating that

> [T]he court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . ., or any other equitable relief as the court deems appropriate.

42 U.S.C. § 2000e-5(g)(1) (emphasis added).

The authority delegated by Congress to the Commission (then the Civil Service Commission, now the EEOC) was commensurate with and explicitly tied to "the policies of this section," which were to eradicate discrimination and "make whole" victims. See generally *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418-21 (1975) (discussing remedial purposes of Title VII, legislative history of Equal Employment Opportunity Act of 1972, and the origin and nature of "make whole" relief); see also *id.*, at 442-46 (Rehnquist, J., concurring) (distinguishing backpay from compensatory damages).

Prior to 1991, Title VII was overwhelmingly interpreted to permit awards of equitable relief, but not compensatory or punitive damages. *Landgraf v. USI Film Products*, 511 U.S. 244, 252-53 (1994); *United States v. Burke*, 504 U.S. 229, 238-39 (1992); *Great American Federal Savings & Loan Ass'n v. Novotny*, 442 U.S. 366, 374-76 (1979); *Brown v. General Services Administration*, 425 U.S. 820, 833-35 (1976); see also *Richerson v. Jones*, 551 F.2d 918, 926-28 (3d Cir. 1977).

Congress did not delegate to the EEOC discretion to determine which "remedies" were "appropriate" in the abstract: Congress decided the type of remedies available to the EEOC, and it delegated discretion to determine which equitable remedies were appropriate in particular cases. In an ordinary statutory construction case, the analysis would begin with the terms of the statute, and if the terms were plain and unambiguous, the analysis would end there as well. *Hughes Aircraft Co. v. Jacobson*, ___ U.S. ___, 119 S.Ct. 755, 760 (1999). Here, Section 717 plainly and unambiguously provides for equitable remedies only, and so further analysis is unwarranted.

But the issue here is whether Congress waived sovereign immunity for the purposes of compensatory damage awards at the administrative level. Therefore, Section 717 must be construed strictly in favor of the sovereign, the waiver must not be enlarged beyond what the language requires, and ambiguities must be interpreted as preserving immunity. Section 717 does not waive sovereign immunity from awards of compensatory damages.

B. Section 102 of the Civil Rights Act of 1991 does not provide the unequivocal statement required to accomplish a waiver of sovereign immunity from administrative awards of compensatory damages

In the Civil Rights Act of 1991, Congress did not amend the administrative delegation in Section 717(b) of the 1964 Act, nor did it alter the "equitable relief" language of Section 706(g), the judicial remedy provision of Title VII; instead, Congress added a new section after 42 U.S.C. § 1981, creating a limited right to compensatory and punitive damages in cases of intentional discrimination not cognizable under Section 1981. Pub.

L. No. 102-166 § 102, Nov. 21, 1991, 105 Stat. 1071, 42 U.S.C. § 1981a (hereinafter "Section 102"). Briefly, Section 102 of the 1991 Act provides, in subsection (a), for the right to compensatory damages; in subsection (b), for limitations and exclusions from the amounts of damages awarded; in subsection (c), for the right to a jury trial; and in subsection (d), for definitions. 42 U.S.C. § 1981a. See *Landgraf v. USI Film Products*, 511 U.S. 244, 252-53, 282-83 (1994) (discussing new right to compensatory damages and jury trial).

In Section 102, Congress expressly waived sovereign immunity only as to awards of compensatory damages in court. Congress did not, as petitioner suggests, authorize the EEOC to award compensatory damages (Petitioner's Brief, p. 15); rather, Congress conferred a right to recover compensatory damages "In an action . . . under section 717 . . . in addition to any relief authorized by section 706(g)," 42 U.S.C. § 1981a(a)(1). Congress further provided that

> If a complaining party seeks compensatory or punitive damages under this section –
>
> (1) any party may demand a trial by jury; and
>
> (2) the court shall not inform the jury of the limitations described in subsection (b)(3).

42 U.S.C. § 1981a(c). Section 102 cannot plausibly be read to authorize compensatory damage awards against the Government at the administrative level.

Initially, Congress expressly authorized compensatory damages "[i]n an action. . . ." 42 U.S.C. § 1981a(a)(1). In the context of compensatory damages, "action" refers to a lawsuit in court. The "[t]erm in its usual legal

sense means a lawsuit brought in a court; a formal complaint within the jurisdiction of a court of law." *Black's Law Dictionary* (6th ed. 1990) 28. Further, Congress did not authorize compensatory damages in just any action, but in "an action brought by a complaining party under Section 706 or 717 of the" 1964 Act. 42 U.S.C. § 1981a(a)(1). The only "action" described in these sections is the "civil action" authorized by Section 706(f) and Section 717(c). 42 U.S.C. § 2000e-5(f); 42 U.S.C. § 2000e-16(c).

Congress demonstrated an awareness that complaining parties could bring "an action or proceeding under title VII," 42 U.S.C. § 1981a(d)(1)(A) (emphasis added), but Congress authorized compensatory damages "in an action," not in a proceeding, 42 U.S.C. § 1981a(a)(1). A review of Sections 706 and 717 of the 1964 Act reveals that "action" generally refers to judicial or civil actions, not to administrative proceedings, and that "proceedings" generally refers to state and local or administrative charges, not to lawsuits in federal court. 42 U.S.C. § 2000e-5; 42 U.S.C. § 2000e-16.[1] Thus, the ordinary meaning of the words and the context of the statutes indicate that Congress authorized compensatory damage awards in civil actions, not in administrative proceedings.

---

[1] In *New York Gaslight Club v. Carey*, 447 U.S. 54, 60-62 (1980), the Court considered the phrase "action or proceeding" in the context of attorney's fees under Title VII, and concluded that "action" referred to "court actions," and "proceedings" referred more generally to state and local or administrative charges.

The structure of the statutes makes the reference to "civil actions" in sections 706 and 717 even more explicit. Section 102 grants the right to recover compensatory damages in an action under Section 706 or 717 "in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964. . . ." 42 U.S.C. § 1981a(a)(1). Section 706(g), in turn, describes the remedies available, not in an administrative proceeding, but from "the court" in a civil action authorized by Section 706(f). 42 U.S.C. § 2000e-5(f) and (g). Section 717(d) specifically incorporates Section 706(g), not for the purpose of administrative enforcement under Section 717(b), but for the purpose of "civil actions" authorized by Section 717(c). 42 U.S.C. § 2000e-16(c) and (d).

By granting the right to compensatory damages "in an action" under Section 717 "in addition to any relief authorized by Section 706(g)," Section 102 explicitly refers to civil actions under Section 717(c), not administrative proceedings under Section 717(b). Congress did not grant the right to compensatory damages "in addition to any relief authorized by Section 717(b)." The administrative delegation in Section 717(b) refers to rules, regulations, orders and instructions, it provides for review of agency plans, for training, education and consultation, but it does not mention any "action" in the sense of an adversarial hearing at all. 42 U.S.C. § 2000e-16(b).[2]

---

[2] Indeed, Congress did not necessarily prescribe an adjudicative process at the administrative level. In addition to its other powers, the EEOC could, consistent with its delegation, rely on conciliation and voluntary compliance rather than adversary proceedings. *See, e.g., Alexander v. Gardner-Denver* (continued...)

When it passed the Civil Rights Act of 1991, Congress amended Sections 706 and 717, see Pub.L. No. 102-166 §§ 107(b) and 114, Nov. 21, 1991, 105 Stat. 1075, 1079, 42 U.S.C. §§ 2000e-5(g) and 2000e-16(d), but it made no change to or mention of the administrative delegation in Section 717(b). Congress expressly authorized awards of compensatory damages in actions arising under the "regulations implementing" Section 501 of the Rehabilitation Act, 42 U.S.C. § 1981a(a)(2), but Congress did not authorize compensatory damage awards in actions or proceedings under the regulations implementing Section 717 of the 1964 Act. Based on the ordinary meaning of the word "action," and the context and structure of Section 102 of the 1991 Act and Sections 706 and 717 of the 1964 Act, it is clear that Congress authorized awards of compensatory damages in federal court, not in administrative proceedings.

Finally, it is clear that Congress authorized compensatory damage awards only in court because Congress bestowed a right to trial by jury, further providing that "the court" should not inform the jury of damage caps. 42 U.S.C. § 1981a(c). Of course, neither a federal employee nor a federal agency may obtain a jury trial in

---

[2] (...continued)
Co., 415 U.S. 36, 44 (1974) ("Cooperation and voluntary compliance were selected as the preferred means" for eradicating discrimination); *Johnson v. Railway Express Agency*, 421 U.S. 454, 461 (1975) ("a suit is privately oriented and narrow, rather than broad in application, as successful conciliation tends to be"). In a conciliation model, the "final action taken" by an agency would be an offer aimed at resolution of the charge of discrimination. The complaining party could then accept the offer, resolving the issue, or reject the offer and file an action in federal district court.

the EEOC. See 29 C.F.R., Part 1614 (no procedure for demanding or obtaining trial by jury). And when a federal employee receives a compensatory damage award from the EEOC, the federal agency may not obtain a trial by jury at all because Section 717(c) confers no right upon the agency to file a civil action. 42 U.S.C. § 2000e-16(c).

As this Court has observed:

> The right of trial by jury is of ancient origin, characterized by Blackstone as "the glory of the English law" and "the most transcendent" privilege which any subject can enjoy" (Bk.3, p. 379). . . . [T]rial by jury has always been, and still is, generally regarded as the normal and preferable mode of disposing of issues of fact in civil cases at law as well as in criminal cases. Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with utmost care.

Dimick v. Schiedt, 293 U.S. 474, 485-86 (1935). The right to a jury trial is no less important because it arises under a statute as opposed to the common law. *Jacob v. City of New York*, 315 U.S. 752, 753 (1942). In addition to its importance to the parties involved, the right to trial by jury serves a public interest in that "jury trials will expose a broader segment of the populace to the example of federal civil rights laws in operation." *Curtis v. Loether*, 415 U.S. 189, 198 (1974).

In Section 102 of the Civil Rights Act of 1991, Congress committed the assessment of compensatory damages to the jury system, not to any administrative

procedure: "Just as they have for hundreds of years, juries are fully capable of determining whether an award of damages is appropriate and if so, how large it must be to compensate the plaintiff adequately. . . ." H.R. Rep. No. 40, 102d Cong., 1st Sess. Pt.1, at 72 (1991). Juries are the acknowledged experts in the individualized assessment of compensatory damages. *See, e.g., Nydam v. Lennerton*, 948 F.2d 808, 811 (1st Cir. 1991) ("Translating legal damages into money damages . . . is a matter peculiarly within a jury's ken").[3]

By ensuring that compensatory damages could be awarded only in an action where "any party may demand a trial by jury," 42 U.S.C. § 1981a(c)(1), Congress clearly and unambiguously limited its waiver of immunity from such awards to civil actions in federal district court. This waiver must be "strictly construed, in terms of its scope, in favor of the sovereign." *Lane v. Pena*, 518 U.S. 187, 192 (1996). Administrative proceedings on compensatory damages violate the unmistakable mandate of Congress by depriving federal agencies of the right to a trial by jury, and by delaying federal employees from the exercise of their right to a trial by jury. Section 102 does not waive sovereign immunity from administrative awards of compensatory damages.

---

[3] See also *American National Bank & Trust Co. v. Regional Transportation Authority*, 125 F.3d 420 (7th Cir. 1997) ("a jury has wide discretion in determining damages"); *Brooks v. Great Lakes Dredge-Dock Co.*, 754 F.2d 539, 541 (5th Cir. 1985) ("nature, character and extent of injury are questions for the jury"); *Vanskike v. Union Pacific Railroad Co.*, 725 F.2d 1146 (8th Cir. 1984) (comparison of verdicts is unhelpful because cases and juries are unique).

C. Petitioner's arguments fail the unequivocal expression test

1. The linchpin of the Government's argument is that Congress waived sovereign immunity for the purpose of administrative awards of compensatory damages when it delegated to EEOC "authority to enforce . . . through appropriate remedies." (Petitioner's Brief, pp. 14-16.) These few words will not bear the weight which petitioner has placed on them. As previously noted, the fuller context of Section 717(b) states that the EEOC "shall have authority to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section. . . ." 42 U.S.C. § 2000e-16(b). This provision does not waive sovereign immunity for the purposes of compensatory damage awards at the administrative level.

By its terms, the "authority to enforce" is limited to subsection (a), which proscribes discrimination in federal personnel decisions. 42 U.S.C. § 2000e-16(a). This limitation corresponds with the primary objective of Title VII at the time Section 717 was enacted, namely, "to assure equality of employment opportunity by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex or national origin." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). And the phrase "through appropriate remedies" is described as "including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section."

This latter description corresponds with the secondary purpose of Title VII at the time, which was to "make

persons whole for injuries suffered on account of unlawful employment discrimination." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975). But "make whole" relief had nothing to do with compensating victims of discrimination for their "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life and other nonpecuniary losses." 42 U.S.C. § 1981a(b)(3). "Make whole" relief was aimed at the "economic character" of discrimination, modeled on the provisions of the National Labor Relations Act which provided a backpay remedy for unfair labor practices. *Albemarle, supra*, at 418-19.

Together, these clauses meant that the EEOC and the courts would have "full authority" to "eradicate federal employment discrimination" and "make whole" victims through injunctive, backpay and other equitable relief. *Brown v. General Services Administration*, 425 U.S. 820, 831 (1976); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975). See also *United States v. Burke*, 504 U.S. 229, 240 (1992) ("Indeed, the circumscribed remedies available under Title VII stand in marked contrast not only to those available under traditional tort law, but under other antidiscrimination statutes as well"). Thus, Section 717(b) did not vest EEOC with "broad discretion to determine which 'remedies' among those authorized by law are 'appropriate'" (Petitioner's Brief, p. 14), it delegated authority to determine which discretionary (that is, equitable) remedies should be awarded in a particular case.

A comparison of Section 717(c) with Section 706(g), the judicial enforcement provision, confirms that the delegation was in the nature of equitable discretion, not remedial license. Section 706(g) parallels Section 717(c),

but the judicial delegation is broader, allowing "such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without backpay . . . or any other equitable relief the court deems appropriate." 42 U.S.C. § 2000e-5(g) (emphasis added). Both provisions delegate authority to fashion equitable relief in particular cases; neither provision delegates discretion to determine what remedies are appropriate in the abstract.

Petitioner construes the terms of Section 717(b) broadly to conclude that "Congress, by making compensatory damages available in judicial proceedings in the Civil Rights Act of 1991, thus gave EEOC the authority to award the same relief in administrative proceedings." (Petitioner's Brief, p. 16.) But this Court requires waivers of sovereign immunity to be strictly construed, and not enlarged beyond what the language of the statute requires. *United States v. Nordic Village, Inc.*, 503 U.S. 30, 34 (1992). And if Section 717(b) is ambiguous, if the statute can plausibly be read to waive sovereign immunity only as to equitable remedies, then the ambiguity should be construed in favor of immunity. *Lane v. Pena*, 518 U.S. 187, 200 (1996).

Petitioner concedes that "Congress . . . did not specify which particular remedies the EEOC may, and may not award," but petitioner argues that EEOC has the power to "fill any gap." (Petitioner's Brief, p. 14.) But this Court has held that only Congress may waive sovereign immunity, that the waiver must be unequivocally expressed and not implied, and that Executive officials cannot waive sovereign immunity. *Lane v. Pena*, 518 U.S. 187, 192 (1996); *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 513-14 (1940).

Since Congress has not unequivocally expressed a waiver of immunity from administrative awards of compensatory damages, no such waiver may be implied, and whatever power EEOC has to fill a gap with respect to general antidiscrimination law, no federal agency may fill a gap in Congress' waiver of sovereign immunity.

2. As Section 102 of the 1991 Act demonstrates, Congress retained the power to determine what remedies were appropriate in the field of employment discrimination. And when Congress conferred the right to compensatory damages, it placed limitations and conditions on the right which apply to all compensatory damage cases. "[T]his Court has long decided that limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied." *Lehman v. Nakshian*, 453 U.S. 156, 161 (1981) quoting *Soriano v. United States*, 352 U.S. 270, 276 (1957). Petitioner's argument nullifies the limitations and conditions of Section 102 of the Civil Rights Act of 1991.

Conceding that the text and the legislative history of Section 102 are silent with respect to the availability of compensatory damages in administrative proceedings,[4]

---

[4] Petitioner points to an estimate by the Congressional Budget Office that the costs of "administrative settlements" could increase, and petitioner infers an "understanding" that compensatory damages would be available at the administrative level. (Petitioner's Brief, pp. 15-16 n.8.) No such "understanding" could be inferred, because federal agencies may be expected to settle compensatory damage claims during the administrative process, in anticipation of litigation. The CBO made no estimate of the cost of administrative awards, and concluded that the increase in settlement costs would be

(continued...)

petitioner nonetheless argues that Congress did not "expressly preclude" such awards. (Petitioner's Brief, p. 15.) This argument cannot withstand statutory analysis. Section 102 expressly creates the right to compensatory damages "[i]n an action . . . under Section . . . 717 . . . in addition to any relief authorized by Section 706(g)." 42 U.S.C. § 1981a(a)(1). For reasons already discussed, this language unambiguously refers to civil actions in federal district court, not administrative proceedings. And the right to trial by jury is antithetical to administrative awards.

Petitioner asserts that the right to a jury trial "is most sensibly construed" as providing that "if a Title VII claim should ripen into a civil action," then any party may demand a trial by jury. (Petitioner's Brief, p. 28.) But the right to a jury trial is tied to a party seeking compensatory damages, not to a request for damages ripening into a civil action. In a footnote, petitioner suggests that Section 102(c) only provides for jury trials "under this section," not under Section 717(b). (Petitioner's Brief, pp. 28-29 n. 19.) But Section 102 is the section which provides a right to compensatory damages for federal employees, and Congress has conditioned this Section 102 right on the right to trial by jury.

The Government's position necessarily implies that the EEOC may select the limitations and conditions that will apply at the administrative level. This approach arrogates to EEOC not only the power to waive

---

[4] (...continued)
insignificant. H.R.Rep. No. 40, 102nd Cong., 1st Sess. Pt. 1, at 108 (1991).

sovereign immunity where Congress has remained silent, but also the power to disregard limitations and conditions upon a waiver of sovereign immunity where Congress has spoken. Petitioner argues at length that juries favor employees, and that Congress could have concluded that federal agencies would be better off with the protection of EEOC expertise than with a right to trial by jury. (Petitioner's Brief, pp. 29-33.) Respondent believes that the less said about this argument, the better. Suffice it to say that Congress provided the right to trial by jury for "any party," and Congress conferred the status of defendant on the heads of federal agencies, not the EEOC. 42 U.S.C. § 2000e-16(c).

3. Petitioner relies on *Jackson v. United States Postal Service,* EEOC Appeal No. 01923399 (Nov. 12, 1992), arguing that this Court should show at least some deference to the EEOC's "well-reasoned view." (Petitioner's Brief, pp. 16, 26-27.) The reasoning in *Jackson* is seriously flawed, and the EEOC's conclusion is incorrect: the *Jackson* opinion is entitled to no deference. Among other flaws, the EEOC wholly failed to address sovereign immunity, the right to trial by jury, and the statutory reference to Section 706(g), concerning judicial remedies.

Contrary to petitioner's suggestion, the EEOC did not reason that compensatory damages came within the Commission's authority under Section 717(b), rather, the EEOC concluded that Section 102 applied to administrative proceedings. *Jackson,* slip op. 3.[5] The EEOC

---

[5] Petitioner now concedes that "Congress did not expressly give EEOC regulatory authority with respect to Section 1981a." (Petitioner's Brief, p. 27.)

supported this conclusion on two legs: (1) that the word "action" included actions arising out of the "regulations implementing" Section 501 of the Rehabilitation Act, and (2) that "complaining party" was defined with reference to an "action or proceeding." *Jackson*, slip op. 5-6. Neither leg supports the EEOC's conclusion.

With respect to the first leg of its reasoning, the EEOC recognized that Congress had not provided for compensatory damages in actions arising out of the "regulations implementing" Title VII, a potentially fatal difference between subsections (a)(1) and (a)(2) of Section 102. *Jackson*, slip op. 5. The Commission attributed the difference to the fact that Section 717 explicitly provides for an administrative complaint process whereas "section 501 of the Rehabilitation Act lacks such a provision." Slip op. 5. But the Rehabilitation Act expressly incorporates the "remedies, procedures, and rights set forth in section 717" for the purpose of "any complaint" under Section 501, see 29 U.S.C. § 794a(a)(1), and so the EEOC's explanation makes no sense.

With respect to the second leg of *Jackson's* reasoning, the EEOC pointed to *New York Gaslight Club v. Carey*, 447 U.S. 54 (1980), in which the Court approved an award of attorney's fees for work performed at the administrative level, since Section 706(k) allowed such awards "in any action or proceeding." In *Jackson*, the EEOC failed to recognize that while Section 102 defined "complaining party" with reference to an "action or proceeding," the operative language of the statute conferred the right to compensatory damages in "an action," not a proceeding. *Jackson*, slip op. 6-7; 42 U.S.C. § 1981a(a)(1). The EEOC erred in its interpretation of Section 102 of the Civil Rights Act of 1991.

4. The passage of the Government Employee Rights Act, Pub. L. No. 102-166, Title III, §§ 301-325, 105 Stat. 1088-99, and the Congressional Accountability Act of 1995, Pub. L. No. 104-1, Title I, §§ 101-02, 109 Stat. 4-6, 2 U.S.C. § 1301 *et seq.* (Supp. II 1996), demonstrate that Congress knows how to unequivocally express a waiver of sovereign immunity at the administrative level. In Section 307(h) of the Government Employee Rights Act, Congress specifically authorized

> such remedies as would be appropriate if awarded under section 706(g) and (k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(g) and (k)), and may also order the award of such compensatory damages as would be appropriate if awarded under section 1977 and section 1977A(a) and (b)(2) of the Revised Statutes (42 U.S.C. 1981 and 1981A(a) and (b)(2)).

Pub. L. No. 102-166, Title III, § 307(h), 105 Stat. 1092.

In the Government Employee Rights Act, Congress specifically waived sovereign immunity for the purpose of equitable remedies, attorney's fees and compensatory damages, and further specified that these remedies could be awarded by a hearing board with no right to a jury trial. Pub. L. No. 102-166, Title III, § 307, 105 Stat. 1091-92. The clarity and specificity of this waiver of sovereign immunity stands in stark contrast to the indirect and internally contradictory waiver of sovereign immunity advanced by petitioner in this case. The contrast is heightened by the inclusion of the Government Employee Rights Act in the Civil Rights Act of 1991.

Aside from their dissimilarity in terms of the waiver of sovereign immunity, the enforcement scheme under

the Government Employee Rights Act was very different from the Title VII enforcement scheme. The statute applied to Senate employees, was administered by a Senate Office with no regulatory authority, provided for closed hearings, Senate oversight and deferential review by the Court of Appeals for the Federal Circuit. Pub. L. No. 102-166, Title III, §§ 302-03, 307(d)(1), 308-09, 105 Stat. 1088-94. Senator Mitchell may have intended to design a process similar to the civil service process (see Petitioner's Brief, p. 22), but the reality of the Government Employee Rights Act was quite different.

Similarly, the Congressional Accountability Act of 1995 contained a clear textual waiver of sovereign immunity with respect to equitable remedies under Section 706(g), and compensatory damages under Section 1981 or 1981a. 2 U.S.C. § 1311(b)(1). In the Congressional Accountability Act, Congress delegated no regulatory authority concerning discrimination claims, and provided for an election procedure whereby an employee could choose an administrative path with deferential review in the Court of Appeals, or a judicial path in federal district court. 2 U.S.C. §§ 1401-08. Congress included a provision for jury trials in civil actions, but not in the administrative process. 2 U.S.C. § 1408(c).

Again, the contrast between the clear waiver of sovereign immunity under the Congressional Accountability Act and the purported waiver advanced by petitioner in this case is striking. In the Congressional Accountability Act, Congress unequivocally expressed a waiver of compensatory damages at the administrative level and conditioned the right to compensatory damages on the

right to trial by jury only on the judicial pathway. Again, whatever Senator Lieberman may have intended with respect to the similarity of enforcement agencies (see Petitioner's Brief, pp. 23-24), it is clear that the Congressional Accountability Act bears little resemblance to Title VII.

5. That Congress limited compensatory damage awards to actions in federal court will not significantly undermine the administrative exhaustion requirement. Petitioner claims that three purposes of the exhaustion requirement would be undermined: (1) The agency's ability to correct its own errors, (2) The EEOC's ability to apply its expertise, and (3) The judicial economy in pre-suit resolution. (Petitioner's Brief, pp. 17-19.) The first interest is substantial, but it is not impaired by limiting compensatory damage awards to actions in federal court. Agencies will still have every opportunity to correct their own errors in the administrative process, before a civil action is filed. If an agency anticipates liability for compensatory damages, it may correct its error by offering a settlement.[6]

The second interest is less substantial, but minimally impaired. The EEOC will still have every opportunity to apply its expertise with respect to employment discrimination and equitable remedies. But the EEOC has

---

[6] Sovereign immunity does not preclude a voluntary settlement in anticipation of a future liability. *Crawford v. Babbitt*, 148 F.2d 1318, 1326 (11th Cir. 1998); *see also Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 52 (1986) (sovereign has power to contract); *Holmes v. Department of Veterans Affairs*, 58 F.3d 628, 632 (Fed. Cir. 1995) (settlement agreement is a contract).

no particular expertise in the field of compensatory damages. Juries are the experts when it comes to assessing compensatory damages, and for this reason, Congress committed this remedy to the jury system. The EEOC will continue to play an important role in conciliation and voluntary settlement of compensatory damage claims, but not at the expense of the parties' right to be heard in federal court.

The third interest is also substantial, but will be impaired only to the extent necessary to secure the parties' rights. Petitioner raises the specter of thousands of cases haunting the federal courts. (Petitioner's Brief, p. 20.) Although the Report cited in petitioner's brief is not yet available to the public, there is reason to believe that the numbers are not large. In fiscal year 1996, the last year for which statistics are generally available, there were 26,410 EEO complaints filed against federal agencies. EEOC, *Federal Sector Report on EEO Complaints Processing and Appeals by Federal Agencies for Fiscal Year 1996*, at T-3 (1997). More than one-third of that number, 8,904 were dismissed, and another one-third, 8,483 were withdrawn or settled. *Id.*, at T-27.

Of the 7,763 complaints that were decided by agencies, more than 60% were decided without hearings, and less than 40% required hearings. *Id.*, at T-30. There were 8,961 closures with corrective action, but this number includes both settlements and awards, and it includes corrective actions both with and without backpay. *Id.*, at 44. There were 3,429 closures with corrective action and backpay. *Id.* The EEOC does not report the number of compensatory damage awards or

settlements, but the dollar amount for compensatory damages was about half of the dollar amount for backpay. *Id.*, at T-33. Based on the numbers the EEOC has made available, the pool of potential litigants does not seem too large.

Congress considered and rejected the argument that making compensatory damages available in court would "open the floodgates" and undermine the goal of voluntary settlement. H.R. Rep. No. 40, 102d Cong., 1st Sess. Pt. 1, at 70-73. For example, anecdotal and statistical evidence indicated that victims of employment discrimination who had access to both Title VII and Section 1981 remedies continued to use Title VII's conciliation process, and had about the same settlement rate as others. *Id.*, p. 73. Given the size of awards in employment discrimination suits, the likelihood of success, and the effort and expense involved in suing one's employer, the danger of frivolous lawsuits seemed to the majority to be remote. *Id.*, at 70-72.

In any event, a waiver of sovereign immunity cannot be found in the policy considerations underlying a statute. *Library of Congress v. Shaw*, 478 U.S. 310, 321 (1986). "It may well be . . . that routine trials *de novo* in the federal courts will tend ultimately to defeat rather than to advance the basic purposes of the statutory scheme. But Congress has made the choice, and it is not for us to disturb it." *Chandler v. Roudebush*, 425 U.S. 840, 863-64 (1976). See also *Johnson v. Railway Express Agency*, 421 U.S. 454, 461 (1975) ("But these are the natural effects of the choice Congress has made available to the claimant by its conferring upon him independent administrative and judicial remedies").

II.

THE COURT SHOULD AFFIRM THE SEVENTH CIRCUIT ON ALTERNATE GROUNDS APPEARING IN THE RECORD

Assuming *arguendo* that the EEOC has authority to award compensatory damages, the Court should affirm the judgment of the Seventh Circuit because the record affirmatively reveals that Mike Gibson exhausted his administrative remedies. A respondent may assert any matter in support of his judgment, even though it may involve an attack upon the reasoning of the lower court, or insistence on matters overlooked or ignored, so long as the ground appears in the record. *Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970). "[A] prevailing party, without cross-petitioning, is entitled under our precedents to urge any grounds which lend support to the judgment below." *United States v. X-Citement Video, Inc*, 513 U.S. 64, 78 (1994) quoting *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 419 (1977).

Section 102 of the Civil Rights Act of 1991 provides that an employee has the right to a jury trial on his employment discrimination claim, even if the employer is the federal government. Mike Gibson exercised his rights, followed all the rules, complied fully with EEOC rules, regulations, and instructions. After receiving less than full relief, Gibson properly pursued his claim in federal court. The EEOC cannot now argue that Gibson failed to use magic words and is barred from filing suit in federal court.

A. The Supreme Court should affirm the decision by the Seventh Circuit because Gibson exhausted his administrative remedies

What constitutes exhaustion of administrative relief has not been clearly addressed. It appears that exhaustion encompasses a timely filed complaint containing certain factual allegations, presented to and investigated by the EEOC as part of the EEOC complaint process, and also requires the applicant's cooperation with the process.[7] Gibson submits that existing federal law, together with EEOC rules, support his contention that specific factual pleading of a particular category of damages is not required for exhaustion.

It is established that the remedy flows from the claim asserted, and a request for relief may be amended at any time during the administrative process without restriction. *Carlson v. Secretary of the Navy*, EEOC Request No. 05930480, 1994 WL 735488 (Apr. 26, 1994); *Sloan v. U.S. Postal Service*, EEOC Petition No. 03940166, 1995 WL 62723 (Feb. 9, 1995). Since the agency may pursue any form of relief as it relates to the discriminatory act of which Gibson gave written notice, Gibson did not fail to exhaust his administrative remedies by not specifically requesting "compensatory damages."

There is no authority that permits the VA to bar Gibson from pursuing his claim in federal court for

---

[7] Barbara Lindemann and Paul Grossman, *Employment Discrimination Law* 57 (3d ed. 1996); *see also Wade v. Secretary of the Army*, 796 F.2d 1369, 1377 (11th Cir. 1986) ("Good faith effort by the employee to cooperate with the agency . . . and to provide all relevant, available information is all that exhaustion requires.").

failing to request a specific category of damages. Moreover, the imposition of a fact pleading requirement with respect to injuries at the administrative level would run counter to settled law holding that Title VII procedures should be accessible to lay people. *Love v. The Pullman Co.*, 404 U.S. 522, 527 (1972) ("Such technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers initiate the process").

One purpose of Title VII is to make persons whole for injuries suffered on account of unlawful employment discrimination. *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 418 (1975). Section 102 of the Civil Rights Act of 1991 authorizes compensatory damages for "emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life and other non-pecuniary losses" experienced by victims of intentional discrimination. 42 U.S.C. § 1981a(b)(3). In addition, Federal Rule Civil Procedure 54(c) provides that "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings." Fed. R. Civ. P. 54(c).

Consistent with these general rules, the EEOC regulations require both the employing agency and the EEOC to provide victims of discrimination "full relief" regardless of what the complainant writes in the "corrective action" box on the initial EEO complaint form. See 29 C.F.R. § 1614.501 and Appendix A to Part 1613. The EEOC regulation which covers the filing of EEO complaints only requires precise information as to the identities of the parties and the factual basis for

the claim; the regulation is silent as to requests for relief. 29 C.F.R. § 1614.106(c).

Indeed, the EEO complaint form at the heart of the VA's argument does not ask what injuries the complainant suffered. (Jt. App. 23-24.) Gibson's original EEO complaint specifically identified the person claiming to be aggrieved, the agency that allegedly discriminated against him, and the actions or practices forming the basis for his complaint. These are the only mandatory contents of an EEO complaint. See 29 C.F.R. § 1614.106 (Jt. App. 61-62.) The instructions on the back of the complaint form emphasize the importance of detail in describing the discriminatory conduct (Blocks 8 and 9), but the instructions are silent as to "corrective action" (Block 10). (Jt. App. 24.) Clearly, the EEOC was not bound by Gibson's request for relief in this case, and, in fact, the EEOC awarded a promotion which Gibson failed to request. (Jt. App. 23, 43.)

Furthermore, during the investigation of his case, Gibson requested a "monetary cash award." (R. 25, Reply to Gibson's Rule 12(N) Statement, Exhibit 2, p. 13.) In a nearly identical case, the EEOC held that a request for "appropriate monetary award" was a request for compensatory damages sufficient to trigger the agency's duty to investigate. *Price v. U.S. Postal Service,* EEOC Request No. 05950480, 97 FEOR 3031, 1996 WL 600763, at *6-7 (Oct. 11, 1996).[8] In *Price*, the

---

[8] EEOC case law supports that this demand is consistent with a request for compensatory damages. "The Commission has held that a complainant need not use legal terms of art such as 'compensatory damages,' but may merely use words or

(continued...)

EEOC reversed a dismissal based on an offer of full relief because the complainant had requested compensatory damages:

> The record, however, contains no evidence that appellant was ever asked to provide evidence substantiating her claim for compensatory damages. As previously noted, appellant, in her request for counseling, indicated that she was seeking an "appropriate monetary reward." The Commission interprets said statement to be a request for compensatory damages. Therefore, since appellant raised a claim for compensatory damages in her request for counseling, we find that the agency should have requested objective evidence of the alleged damages incurred and evidence that the damages were linked to the alleged unlawful discrimination prior to making its certified offer. *See* Jackson v. USPS, EEOC Appeal No. 01923399 (November 12, 1992), *request to reconsider denied*, EEOC Request No. 05930306 (February 1, 1993).

Id.

---

[8] (...continued)
phrases to put the agency on notice that the relevant pecuniary or non-pecuniary loss has been incurred." *Price v. U.S. Postal Service*, EEOC Request No. 05950480, 97 FEOR 3031, 1996 WL 600763, at *7 (Oct. 11, 1996); *see also Haynes v. U.S. Postal Service*, EEOC Request No. 05920891, 94 FEOR 3168, 1993 WL 762904 (December 14, 1993); *Fiandaca v. Department of the Navy*, EEOC No. 01943264, 96 FEOR 3012, at XII-43, XI-46 n.3, 1995 WL 577063 (Sept. 21, 1995), *request to reconsider denied*, EEOC Request No. 05960069, 1997 WL 40386 (Jan. 24, 1997). A complainant's request during EEO counseling for a cash settlement of $300 was sufficient to make a claim for compensatory damages in one instance. *See Zurcher v. U.S. Postal Service*, EEOC No. 01945859, 95 FEOR 1176, at XI-168 to XI-169, 1995 WL 9592 (February 28, 1995) (reversing dismissal of complaint for mootness and remanding for further processing because agency failed to request objective evidence of damages and linkage after complainant requested cash settlement).

Petitioner suggests that this inquiry is foreclosed by the law of the case doctrine. (Petitioner's Reply Brief on Certiorari Petition at p. 2.) The law of the case, however, cannot bind this Court in reviewing decisions below. *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 816 (1988).

Once the agency is put on notice of facts that may justify an award of compensatory damages, the burden then shifts to the employing agency to investigate the claim for compensatory damages. *Fitzgerald v. Department of Veterans Affairs*, 121 F.3d 203, 208 (5th Cir. 1997). Under the EEOC's rules, if a demand for "appropriate monetary reward" is sufficient to place the EEOC on notice, certainly a request for "monetary cash award" would likewise place the EEOC on notice that a claim may justify an award of compensatory damages. To hold otherwise would defeat Congressional intent that Title VII should be accessible to the lay person.

But even if Gibson did not request general compensatory damages at the administrative level, he nonetheless exhausted his administrative remedies. Gibson's request for relief was not the essence of his claim. Gibson's "claim" comprised the factual allegations of unlawful discrimination. Gibson exhausted the administrative process with respect to his claim of intentional discrimination by timely filing his complaint, which was presented to and investigated by the EEOC. *See, e.g., EEOC v. Farmer Bros. Co.*, 31 F.3d 891, 898-99 (9th

Cir. 1994) (The EEOC's investigation of the agency-level complaint, which was reasonably related to the judicial claim, exhausted administrative remedies for the employee.)

Gibson's complaint in this case is based on the same discriminatory conduct as his EEO charge, and on damages growing out of that charge. Gibson has made no separate claim of harassment or retaliation or intentional infliction of emotional distress, only a related claim that he suffered humiliation and mental anguish as a result of the original discrimination, being required to work for the person who was promoted over him and the two supervisors who discriminated against him. Gibson seeks precisely the kind of general compensatory damages authorized by Section 102. 42 U.S.C. § 1981a.

Gibson exhausted his administrative remedies, but he did not receive full relief. Title VII should not be construed to require claimants seeking compensatory damages to separately grieve every instance of emotional pain and loss of enjoyment of life they experience, while their original claim of discrimination is pending. To impose such a requirement would limit the award of general compensatory damages only to the most inveterate complainers.

Having concluded that Gibson was a victim of intentional discrimination, the EEOC was required by law to provide "full" and "appropriate" relief. 42 U.S.C. § 2000e-5(g) (incorporated at 42 U.S.C. § 2000e-16(d)); 29 C.F.R. § 1614.501 and Appendix A to Part 1613. If the EEOC has authority to award compensatory damages at the administrative level, EEOC failed to grant

such relief to Gibson. 42 U.S.C. § 1981a. Gibson was aggrieved by the final decision of the EEOC, and so he was entitled to file suit in federal court seeking these damages. 42 U.S.C. § 2000e-16(c); 42 U.S.C. § 1981a. The judgment of the court of appeals should be affirmed on this alternate ground, or the case should be remanded for further consideration.

B. The petitioner should be estopped from raising the bar of exhaustion of administrative remedies by having breached its affirmative obligation to advise Gibson of his right to compensatory damages

It is settled law that in Title VII cases, the exhaustion requirement is subject to the doctrines of waiver, estoppel, and equitable tolling. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982). Although *Zipes* involved an employment suit against a private defendant, this Court subsequently held that the same presumption of equitable tolling applied to suits in federal employment cases. *See Irwin v. Department of Veteran Affairs*, 498 U.S. 89, 95-96 (1991) ("We therefore hold that the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States"). Gibson submits that the VA should be estopped from asserting exhaustion by its failure to advise Gibson of his right to request compensatory damages.

The regulations promulgated by the EEOC impose an affirmative duty upon EEO counselors to "advise individuals in writing of their rights and responsibilities" in connection with EEO complaints. 29 C.F.R.

§ 1614.105(b). The regulations further require the EEOC to review agency resources and procedures periodically to ensure that agencies are giving complainants sufficient notice of their rights. 29 C.F.R. § 1614.104(b). Gibson spoke with an EEO counselor for the VA prior to filling out his EEO complaint, but he was not advised of his right to receive general compensatory damages. (R.22, Plaintiff's Response to Defendant's Rule 12 (M) Statement, p.3 and Exhibit A, p. 2.)

Lucinda A. Riley, in her book entitled *Assessing Compensatory Damages Claims in Federal EEO Cases* points out that the issue of what a complainant must allege to raise a claim of compensatory damages has generated much administrative litigation in the federal sector since the passage of the Civil Rights Act of 1991.[9] She comments:

> Initially, federal agencies challenged and resisted the imposition of compensatory damages in the administrative process. Additionally, many agencies, intentionally or negligently, failed to notify complainants of their rights to compensatory damages. Some agencies opined that if the complainant failed to initially raise such claims, their later requests would be barred, so the less said, the better. Underpinning their concerns was the agencies' fear that if the complainants were notified of their rights, they might assert them.[10]

---

[9] Lucinda A. Riley, *Assessing Compensatory Damages Claims in Federal EEO Cases* 49 (LRP Pub. 1998).

[10] *Id.*

Respondent cannot say whether the VA's failure to advise Gibson was intentional or negligent. But the regulations explicitly place the burden on the VA to advise Gibson and to investigate the facts to determine whether Gibson was entitled to compensatory damages. Having breached its duties to advise and investigate, the VA is estopped from asserting the bar of exhaustion.

Title VII was amended in 1972 to extend the protections of the Civil Rights Act to federal employees; courts have accordingly striven to afford federal employees the same procedural and substantive rights as private employees. *See Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95-96 (1990). One of the specific evils addressed by extending Title VII to federal employees was the "defense of . . . failure to exhaust administrative remedies with no certainty as to the steps required to exhaust such remedies." *Brown v. General Services Administration*, 425 U.S. at 827-28.

The VA had an affirmative duty to advise Gibson of his rights and to investigate his compensatory damage claim. Undisputed facts demonstrate that the VA did not advise Gibson of his right to general compensatory damages, and the VA did not investigate his damages. The VA cannot equitably benefit from the breach of its duty to advise Gibson of his rights and to investigate his damages by cutting off those rights. The Court should hold that the VA is estopped from asserting an exhaustion defense in this case, and affirm the judgment of the court of appeals, or remand for further consideration.

CONCLUSION

The judgment of the United States Court of Appeals for the Seventh Circuit should be affirmed or remanded.

Respectfully submitted,

TIMOTHY M. KELLY
Counsel of Record
BEERMANN, SWERDLOVE, WOLOSHIN,
BAREZKY, BECKER, GENIN & LONDON
161 North Clark Street, Suite 2600
Chicago, Illinois 60601
(312) 621-9700

Attorneys for Respondent

Dated: March 24, 1999